IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 32 OF 2006

SMT. ANA MARIA PEREIRA AND ANR., ...Appellants

Versus

SMT. RITA LUIS,CURTORIM, SALCETE GOA. ....Respondent

Mr. S. S. Kakodkar, Advocate for the Appellants.
Mr. C. A. Ferreira with Mr. C. Fernandes, Advocate for the Respondent.

Coram:- A. P. LAVANDE, J.

Date:- 5th May, 2006

P.C.:

Heard Mr. S. Kakodkar, learned Counsel for the Appellants and Mr. C. Ferreira, learned Counsel for the Respondent.

By this Second Appeal, the Appellants take exception of the Judgment and Decree dated 17.11.2005 reversing the decree passed by the trial Court dated 27.02.2003, dismissing the suit filed by the respondent herein. The respondent/plaintiff filed the suit for recovery of possession and injunction. The suit was dismissed mainly on the ground that the plaintiff had failed to prove even the existence of the suit house in respect of which the plaintiff had claimed relief. The Appellate Court in my opinion rightly reversed the said finding since in the sale deed executed in favour of the respondent there is a mention of the house. The Appellate Court held that the plaintiff had established title to the plot in which the suit house is existing. This finding given by the Appellate Court, in my opinion, is based on evidence of record. In one breath, the defendant claimed to be the owner of the suit house and at the same time claimed to be mundkar of the suit house. The Appellate Court having held that the plaintiff had proved this title to the suit plot and that the defendant had not

been able to establish any right to the suit house, decreed the suit.

Mr. Kakodkar, the learned Counsel appearing for the appellants submits that the Appellate court having held that the plaintiff had given notice for eviction of the defendants from the suit house in the year 1990, ought to have dismissed the suit on the ground of limitation. According to the learned Counsel it is the duty of the Court to find out whether the suit is within limitation in view of the Limitation Act, 1963. In support of his submissions, he placed before Judgments reported in Food Corporation of India and others V. M/s. Babulal Agrawal, AIR 2004 SC 2926 and Rama Shankar Singh and another V. Mst. Shyamlata Devi and others, AIR 1970 SC 716. He than contended that the 1st Appellate Court has not even framed point for determination in respect of the alterations made to the suit house and therefore impugned decree is unsustainable. He further submitted that since the father of the defendants was a Mundkar in respect of the suit house, the plaintiff has no right in respect of the suit house and therefore the impugned decree be quashed and set aside.

Mr. Ferreira, the learned Counsel appearing for the respondent/plaintiff submitted that even if notice dated 27.07.1990 issued by the plaintiff to the defendant is considered still the suit filed in 1998 is within limitation having been filed within 12 years of the cause of action. According to Mr. Ferreira prayed clause (a) of the plaint although couched as relief of mandatory injunction in substance the relief is for recovery of possession and therefore even after considering the said notice, the decree passed by the Appellate Court cannot be faulted.

I have considered the submissions made by the learned Counsel. Mr. Kakodkar is right in his submissions that point of limitation can be raised in Second Appeal for the first time if circumstances warrant, but I am in agreement with Mr. Ferreira that even if said notice dated 27.07.1990 is considered the relief possession claimed in the year 1998 cannot be said to be barred by limitation. Therefore, I do not find any merit in the submission of Mr. Kakodkar that suit filed by plaintiff is barred by

limitation.

In so far as non-framing of point for determination regarding improvements made to the suit house by the Appellate Court is concerned, the same does not advance the case of appellants as such in view of the finding on title. In so far as claim of Mundkarship is concerned, in my opinion, the defendants cannot be permitted to raise this plea for the first time in Second Appeal without taking the point before the trial Court. The pleading in the written statement are vague and the defendants have not even mentioned the name of the Bhatkar through whom they claim Mundkarship. Therefore, there is no merit in the submission made by Mr. Kakodkar in so far as the issue of Mundkarship is concerned.

In the result therefore, I find that no substantial question of law arises in this Second Appeal and therefore, the same is summarily rejected.

A. P. LAVANDE, J.

AN.